

Gideon's Silence

Whatever happened to the right to counsel?

By Alexandra Natapoff

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Judge Arthur L. Hunter Jr. is fed up. The complete destruction of the public-defender system has left more than 1,000 people sitting in soggy New Orleans jails without access to lawyers. So, Judge Hunter, a former police officer, is suspending prosecutions and setting defendants free. In the words of last week's [New York Times](#), "alone among a dozen criminal court judges, he has granted a petition to free a prisoner facing serious charges without counsel, and is considering others."

Judge Hunter is responding to a hidden reality of the American criminal-justice system as a whole: Without defense counsel it grinds to a screeching halt. Suspects who lack lawyers may languish in jail without any sort of hearing for months, with no way to prove their innocence or even plead guilty. Once again, post-Katrina New Orleans reveals a national state of affairs, this one affecting courthouses across the country.

So, how bad is the post-Katrina state of criminal defense? "Indigent clients ... remain in pretrial detention for up to five or six months without a single contact from an attorney." One woman "was in jail eleven months before a lawyer was appointed," while another person "spent thirteen months in jail without seeing a lawyer or a judge."

Wait a minute. These quotes are not from New Orleans, post-Katrina. They are from a 2004 [American Bar Association report](#). And they describe, respectively, what's happening in Montana, Mississippi, and Georgia. The same report reveals what typically occurs when indigent defendants finally get a lawyer: Within hours or even minutes, they plead guilty. "At nine o'clock in the morning [in Crisp County, Ga.] they would be calling the calendar and no one ... would have a lawyer. By twelve noon everybody will have pled guilty and been sentenced." In Quitman County, Miss., "42% of the indigent defense cases were resolved by guilty plea on ... the first day the part-time contract defender met the client." One Alabama witness testified that "contract defenders in that state basically do nothing but process defendants to a guilty plea in as expeditious a manner as possible."

Whatever happened to "innocent until proven guilty"? This lack of meaningful defense is a nationwide phenomenon, and it's attributable in part to massive caseloads. Public defenders in states as diverse as New York and Nebraska carry caseloads of hundreds or even thousands of clients, and they may meet literally for minutes with them before that client pleads guilty or (only rarely) goes to trial. Even before Katrina, Louisiana indigent defense practices were described in the ABA report as follows: "What happens ... is that on the morning of the trial, the public defender will introduce himself to his client, tell him the 'deal' that has been negotiated, and ask him to 'sign here.' "

Some states do not use public-defender systems at all but rely instead on low-bid contracts in which private lawyers compete to represent all the indigent defendants in a jurisdiction for one lump sum. This lump sum pays not only for the lawyer's time but for any investigation, experts, and other expenses. In its 2000 special report "[Contracting for Indigent Defense Services](#)," the U.S. Department of Justice documented the breakdown of this arrangement in numerous states, in which lawyers acquire hundreds of new clients with whom they may spend only minutes and whom they cannot properly represent. In one California example, the contract attorney was responsible for "more than 5,000 cases each year. ... In order to

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make a profit, the contractor had to spend as little time as possible on each case." As the DOJ report points out, such low-bid contracts contain an inherent conflict of interest when every penny spent investigating the case, hiring experts, or going to trial comes out of the lawyer's pocket. Although a few courts have declared such low-bid, conflicted arrangements unconstitutional, numerous states and counties rely on them.

The ABA report concludes as follows:

[T]housands of persons are processed in America's courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation. All too often, defendants plead guilty, even if they are innocent, without really understanding their legal rights or what is occurring. Sometimes the proceedings reflect little or no recognition that the accused is mentally ill or does not adequately understand English. The fundamental right to a lawyer that Americans assume applies to everyone accused of criminal conduct effectively does not exist in practice for countless people across the United States.

Unfortunately, our criminal system has become so immense and informal that we've lost sight of the constitutional guarantee of a meaningful defense. Approximately 80 percent of criminal defendants cannot afford counsel and must rely on [publicly provided defense](#). While some public-defender offices still manage to provide excellent representation, they do so against the odds. Suspects around the country routinely fill jails and wait weeks or months for a lawyer and a hearing. When they do finally get a lawyer, that person is typically so overworked that they have little time to talk to their client, investigate the case, research the law, or otherwise provide meaningful representation.

And so people plead guilty, at a rate of 90 percent to 95 percent. The criminal trial is nearly extinct. Most defendants never get the benefits of the constitutional protections contained in the Bill of Rights. To be charged with a crime means, in practice, that you will most likely plead guilty to a crime, not because you are guilty, but because the system offers no other realistic options.

This state of affairs has eroded our collective bedrock intuition that people are innocent until proven guilty. The *New York Times* tells us breathlessly that Judge Hunter *actually* released a person facing a *serious* charge and is even considering doing it *again*. As if it might be appropriate to keep people accused of "serious" crimes locked up without lawyers, just in case. But the right to decent counsel does not diminish when a person is accused of a really serious offense. If anything, the Constitution becomes more important the more serious the charge, and the more intrusive the government wants to be. After all, what were [Hamdi](#) and [Padilla](#) but cases in which the government alleged that the terrorism accusations were so "serious" that we should dispense with the usual constitutional protections? The Supreme Court, in its *Hamdi* opinion, rebuked the government for that stance, holding that even enemy combatants and terrorists cannot be detained indefinitely without due process and access to legal representation.

Ironically, poor U.S. citizens with no connections to al-Qaida have long languished in jails without counsel, or at least without counsel who can spend more than a few minutes showing them where to sign the guilty-plea papers.

So, back to Judge Hunter. Although he was galvanized by disaster, his response is actually quite modest: He is trying to enforce the Sixth Amendment of the U.S. Constitution, which reads: "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." The U.S. Supreme Court has made it clear for

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decades that if the government wants to prosecute and incarcerate an individual, it can only do so if that person has a competent lawyer. In its landmark case [Gideon v. Wainwright](#) the court invalidated Clarence Gideon's conviction because he wasn't represented. Threw the conviction out. Overturned it. Told the government: "You can't do that. No lawyer, no prosecution." Today, Judge Hunter is saying no less.

This is yet another one of those "Katrina moments" in which we realize that post-Katrina New Orleans is a high-definition example of how this nation routinely treats the poor and people of color. Right after the hurricane, the Brookings Institution issued a [report](#) on national poverty saying that, "Hurricane Katrina's assault on New Orleans' most vulnerable residents and neighborhoods has reinvigorated the dialogue on race and class in America." Well, today, Judge Hunter re-reinvigorates that dialogue, this time over the right to counsel for those same poor, vulnerable individuals. Just as important, he reminds us all that it shouldn't take a hurricane to uphold the Constitution.
